Supreme Court, U.S.
FILED

10-19 JUN 28 2010

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CHRISTOPHER WINN, *ET AL.*,

Petitioners,

v.

ALAMO TITLE INSURANCE COMPANY, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Loren Kieve
Counsel of Record
KIEVE LAW OFFICES
5A Funston Avenue
San Francisco, California 94129-1110
(415) 364-0060
LK@KIEVELAW.COM
Attorneys for Petitioners

(List of counsel continued inside cover)

June 2010

(List of counsel continued from front cover)

William S. Shepherd
SHEPHERD SMITH & EDWARDS LLP
1010 Lamar Street, Suite 900
Houston, Texas 77002
(713) 227-2400
WSS@SSELAW.COM

Louis F. Burke
LOUIS F. BURKE, P.C.
460 Park Avenue, 21st Floor
New York, New York 10022
(212) 682-1700
LBURKE@LFBLAW.COM

Christopher J. Gray
LAW OFFICE OF CHRISTOPHER J. GRAY, P.C.
460 Park Avenue, 21st Floor
New York, New York 10022
(212) 838-3221
GRAY@CJGRAYLAW.COM

Krishna B. Narine
LAW OFFICE OF KRISHNA B. NARINE
2600 Philmont Avenue
Huntington Valley, Pennsylvania 19006
(215) 914-2460
KNARINE@KBNLAW.COM

QUESTIONS PRESENTED

1. Whether the federal "filed rate" doctrine articulated in *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156 (1922), and its progeny bars Texas state antitrust and state unfair practices claims by Texas purchasers of title insurance where Texas law expressly forbids these practices.

2. Whether the court of appeals should have addressed or certified to the Texas Supreme Court the key unresolved questions of whether the plaintiffs' Texas state law claims are barred by Texas law.

PARTIES TO THE PROCEEDINGS BELOW

The petitioners (plaintiffs and appellants below) are Christopher Winn, William Cummings, Christopher Villemarette and Natalie Cummings, individually and on behalf of others similarly situated.

The respondents (defendants and appellees below) are Alamo Title Insurance Company, Fidelity National Title Insurance Company, Chicago Title Insurance Company, Ticor Title Insurance Company, Fidelity National Finance, Inc., First AmericanTitle Insurance Company of New York, United General Title Insurance Company; First American Title Insurance Company, Commonwealth Land Title Insurance Company, Lawyers Title Insurance Corporation, Landamerica Financial Group, Stewart Title Insurance Company, and Stewart Information Services Corporation.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

A. The Texas Title Insurance Scheme 4

B. Some 80 to 85 Percent of the Title Insurance "Premium" Goes to the Title Agent 5

C. There Is No Relationship Between the Services a Title Agent Actually Performs and the Agent's Split of the "Premium" 6

D. The Title Company and the Agent Are Free to Negotiate The Split of the "Premium" 8

E. The Result Is that Texas's Title Insurance "Premiums" Are the Highest in the Country ... 9

F. Inflated Title Insurance Rates Are the Result of Kickbacks and "Reinsurance" Schemes 11

REASONS FOR GRANTING THE WRIT 12

A. The Fifth Circuit's Decision Creates a Division Among the Federal Courts of Appeals on an Important Issue Governing the Relationship Between Federal and State Competition and Consumer Protection Law 12

B. Petitioners Have Valid Claims Under Texas Law that Are Not Barred by a "Filed Rate" 15

1. Texas's "Filed Rate" Doctrine Allows Petitioners to Challenge the Rate's Reasonableness. 15

2. Texas Title Insurance Violates the State Constitution's Due Course of Law Clause. 16

3. The Texas Insurance Code Authorizes the Plaintiffs' Suit. 19

4. The Title Companies' Rebates Are Illegal Under the Texas Insurance Code. 19

5. The Title Companies' Conduct Violates the Texas Free Enterprise and Antitrust Act. 20

6. The Title Companies' Conduct Also Violates the Texas Deceptive Trade Practices Act. 21

7. None of the Title Insurers' Conduct Is Immune Under Texas Law. 22

C. The Fifth Circuit's Decision Failed to Address or Refer Governing Issues of Law to the Texas Supreme Court for a Definitive Ruling 23

CONCLUSION 27

Appendix ..... App. 1

Opinion of the Fifth Circuit ..... App. 2

Judgment of the Fifth Circuit ..... App. 6

Order of the district court ..... App. 8

TABLE OF AUTHORITIES

Page(s)

Cases

3Z Corp. v. Stewart Title Guaranty Co, 851 S.W.2d 933 (Tex. App. - Beaumont 1993, writ denied) 21-22
Aetna Cas. & Sur. Co. v. Martin Surgical Supply Co., 689 S.W.2d 263 (Tex. App. - Houston [1st Dist.] 1985) 22
Arroyo-Melecio v. Puerto Rican American Ins. Co., 398 F.3rd 56 (1st Cir. 2005), ...12
Bellotti v. Baird, 428 U.S. 132, 150-151 (1976) 1, 26
Blaylock v. First American Title Ins. Co., 504 F. Supp. 2nd 1091 (W.D. Wash. 2007).....12, 13
Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) 19
Caller-Times Pub. Co. v. Triad Comm'ns, Inc., 826 S.W.2nd 576 (Tex. 1992) 20, 23
Cellular Plus, Inc. v. Superior Court, 14 Cal.App.4th 1224 (Cal. App. 1993). 14, 23
Chicago Title Ins. Co. v. Butler, 770 So.2d 1210 (Fla. 2000) 5, 16-17
County of Stanislaus v. Pacific Gas & Elec. Co., 114 F.3d 858 (9th Cir. 1997) 14
Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378 (Tex. 2000); 22
Department of Insurance v. Dade County Consumer Advocates Office, 492 So.2d 1032 (Fla. 1986) 16
Doe v. Boys Clubs of Greater Dallas, 907 S.W.2d 472 (Tex. 1995) 20, 21
Duggal v. G. E. Capital Communications Serv., 81 Cal. App. 4th 81 (2000) 14
Edwards v. First American Corp., No. 08-56536 (9th Cir., June 21, 2010) 11

Exxon Corp. v. Superior Court, 51 Cal.App 4th 1672 (1997). 23
Fiess v. State Farm Lloyds, 392 F.3d 802 (5th Cir. 2004) 26
Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)...4
Grounds v. Tolar Indep. Sch. Dist., 856 S.W.2d 417 (Tex. 1993) 18
First American Title Insurance Co. v Combs, Comptroller of Public Accounts, 258 S.W.3d 627 (Tex. 2008), ...6
First Title Co. of Waco v. Garrett, 860 S.W.2d 74, 77 (Tex. 1993), ...21
Keogh v. Chicago & Northwestern Railway, 260 U.S. 156 (1922) 13
Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3rd 979 (9th Cir. 2000); 13, 14, 22, 23-24
Kuper v. Stewart Title Guaranty Co., 2002 Tex. App. LEXIS 3486 (Tex. App. – Houston [1st Dist.] May 16, 2002) 21
Lehman Brothers v. Schein, 416 U.S. 386, 391 (1974)), ...1, 26
Lucas v. United States, 757 S.W.2d 687 (Tex. 1988)..... ....19, 24
MCI Telecommunications Corp. v. AT&T Co., 512 U.S. 218 (1994). 13
Mellinger v. City of Houston, 3 S.W. 249 (Tex. 1887). 18
Meyer v. Nebraska, 262 U.S. 390 (1923) 19
Mid-Century Ins. Co. v. Ademaj, 243 S.W.3rd 618 (Tex. 2007) 15, 24
Mitchell-Tracy v. United General Title Ins. Co., 237 F.R.D. 551 (D. Md. 2006) 4
National Collegiate Athletic Association v. Yco, 114 S.W.3d 584 (Tex. App. - Austin [3rd Dist.] 2003),

reversed on other grounds, 171 S.W.3d 863 (Tex. 2005), ...18
Royal Globe Ins. Co. v. Bar Consultants, 577 S.W.2d 688 (Tex.1979) 22
Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409 (1986) 13, 23
Southwestern Elec. Power Co. v. Grant, 73 S.W.3rd 211 (Tex. 2002) 15
Stewart Title Guaranty Co. v. Sterling, 772 S.W.2d 242 (Tex.App. - Houston [14th Dist.] 1989), *rev'd on other grounds*, 822 S.W.2d 1 (Tex. 1991) 22
Toll v. Moreno, 441 U.S. 458, 459 (1979) 1, 26
Town of Norwood v. New England Power Co., 202 F.3d 408 (1st Cir. 2000).....12, 23
U.S. v. Male, No. 09-940, Slip Op. at 3 (U.S. June 7, 2010) 1, 26
U.S. v. Title Ins. Rating Bur. of Arizona, 700 F.2d 1247 (9th Cir. 1983).....10
University of Tex. Med. Sch. v. Than, 901 S.W.2d 926 (Tex. 1995) 17, 18
Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748 (1976),.....17
Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17 (2d Cir. 1994). 13
Woods v. Mercer, 769 S.W.2d 515 (Tex. 1989).....21

Statutes

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1331.....3
28 U.S.C. § 1337.....3

Cal. Bus. & Prof. Code, § 16700 *et seq.*.....14, 23

Texas Constitution, Art. I, § 19..... 1, 18-19, 25

Texas Constitution, Art. V, § 3-c 3, 24

Tex. Bus. & Com. Code § 15.04 20
Tex. Bus. & Com. Code § 17.41, *et seq.*.....3, 21, 22, 24
Tex. Bus. & Com. Code § 17.46, .46 .....21, 22
Tex. Bus. & Com. Code § 17.50(a)(1).....3, 21
Tex. Ins. Code § 2501.003.....17
Tex. Ins. Code § 2501.005(a) 17
Tex. Ins. Code § 2502.051 .....2, 19, 25
Tex. Ins. Code § 2502.053 .....8, 25
Tex. Ins. Code § 652.00.....17
Tex. Ins. Code § 2652.003(a) 17
Tex. Ins. Code Arts. 9.07(b), (c), 9.30(B)(1) [§§ 2703.151(a), 2703.203-.205, 2703.207-.208, 2502.053-.055.] 6
Tex. Ins. Code. art. 21.21 § 16.....22
Tex. Ins. Code §§ 541.003, .054, .055, .061, .151, .152, .251, .252, 2551.001(c)(3) 2, 19
Tex. Ins. Code § 27053.151(a).....5, 12
Texas Deceptive Trade Practices-Consumer Protection Act, Tex. Bus. & Com. Code §§ 17.41 *et seq.* ("DTPA").....3, 21, 25
Texas Free Enterprise and Antitrust Act, Tex. Bus. & Com. Code §§ 15.01-.26 (the "Texas Antitrust Act") 21, 25

Rules

Fed. R. Civ. P 12(b)(6).....3
Texas Supreme Court Rule 58.1 ..... 2, 24-25

Regulations

28 Tex. Admin. Code § 9.1 (adopting Basic Manual of Rules, Rates, and Forms for the Writing of Title Insurance in Texas).....6, 8

Texas Department of Insurance, "Title Insurance Basic Manual," Section IV (Procedural Rules and Definitions).....5

Treatises

IA AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 247b (3d ed. 2006) 12

INTRODUCTION

Petitioners Christopher Winn, *et al.,* respectfully petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The petition presents two questions of paramount importance to the regulation of commerce and respect for state law causes of action.

First, whether the *federal* "filed rate" doctrine bars the Texas *state law* claims of Texas purchasers of title insurance where Texas statutory and case law expressly allow these claims. The Fifth Circuit's opaque decision did not even refer to state law on this point. In contrast, the Ninth Circuit has squarely held that state law claims will be barred only where state law itself precludes them.

Second, whether the Fifth Circuit should have addressed or certified to the Texas Supreme Court the issue of whether Texas state law would bar the petitioners' Texas state law claims. This Court and other courts of appeals have routinely certified questions to the highest state courts for decision where state law provides the rule of decision and is unclear. *See, e.g., U.S. v. Male,* No. 09-940, Slip Op. at 3 (U.S. June 7, 2010); *Toll v. Moreno*, 441 U.S. 458, 459 (1979). As the Court stressed in *Bellotti v. Baird*, 428 U.S. 132, 150-151 (1976) (quoting from *Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974)), the certification procedure "does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism."

OPINIONS BELOW

The unreported opinion of the United States Court of Appeals is reproduced in the appendix at App. 2. That court's judgment of March 30, 2010 is

reproduced in the appendix at App. 6. The unreported decision of the United States District Court for the Western District of Texas is reproduced in the appendix at App. 8.

JURISDICTION

The Court of Appeals' judgment was entered on March 30, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Article I, § 19 of the Texas Constitution provides that "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."

Tex. Ins. Code § 2502.051 provides that "[a] commission, rebate, discount, portion of a title insurance premium, or other thing of value may not be directly or indirectly paid, allowed, or permitted by a person engaged in the business of title insurance or received or accepted by a person for engaging in the business of title insurance or for soliciting or referring title insurance business."

The Texas Insurance Code authorizes private lawsuits, including class actions, for purchasers of title insurance who have been damaged by unlawful methods, acts or practices – including concerted action that results in or tends to result in the unreasonable restraint of or a monopoly in the business of insurance or making false statements in financial records submitted to the Texas Insurance Department. *See* Texas Ins. Code §§ 541.003, .054, .055, .061, .151, .152, .251, .252, 2551.001(c)(3).

The Texas Deceptive Trade Practices-Consumer Protection Act, Tex. Bus. & Com. Code §§ 17.41 *et seq.* ("DTPA"), provides a cause of action for consumers where (1) the defendant engaged in false, misleading, or deceptive acts and (2) these acts constituted a producing cause of the consumer's damages. Tex. Bus. & Com. Code § 17.50(a)(1).

The Texas Constitution, art. V, § 3-c, authorizes, and Texas Supreme Court Rule 58.1 provides, that "[t]he Supreme Court of Texas may answer questions of law certified to it by any federal appellate court if the certifying court is presented with determinative questions of Texas law having no controlling Supreme Court precedent."

STATEMENT OF THE CASE

This action involves claims by the plaintiffs, home purchasers in Texas, that the defendants conspired to fix the price of title insurance to Texas consumers at artificially high levels – the highest in the country – by including in their filed rates (a) illegal kickbacks, rebates and incentives and (b) a set percentage of title agent fees that bears no relationship to the services a title agent will perform in conducting a title search. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1337.

The defendants moved to dismiss under Fed. R. Civ. P 12(b)(6) on various grounds. The district court dismissed the action on only one of them: the federal "filed rate" doctrine. [App. 8.] Although the plaintiffs' opposition requested leave to amend if the court were to grant the defendants' motion to dismiss, the court simultaneously dismissed the action with prejudice. [App. 8 at 27.]

In a short, unpublished *per curiam* opinion, the Fifth Circuit affirmed. [App. 2.]

A. The Texas Title Insurance Scheme

Title insurance "is an integral aspect of virtually every mortgage loan and refinance transaction." *Mitchell-Tracy v. United General Title Ins. Co.*, 237 F.R.D. 551, 553 (D. Md. 2006). Unlike title insurance in other states, the title insurance "premium" in Texas is all-inclusive. It includes not only the cost of title insurance itself, but also charges by title agents and attorneys for title search, abstracting, title examination, survey review, escrow, the closing (whether performed by an attorney or a title agent or someone else) and issuing the title insurance policy.

The charges for these "services" bear no relationship to the actual costs or reasonableness of the services themselves. A $100,000 policy produces an agent's fee of $717. A $1 million policy gives the agent a $4,806.50 fee. A $25 million policy gives her $106,377. The consumer is not permitted to negotiate any different amount, or to obtain a rebate or discount on the fee, based on what the title agent actually does or does not have to do to examine the title and close the settlement. An agent may spend five minutes or five hours or five days and still receive the same fee – based solely on an arbitrary face value of the title policy.

The defendants' title insurance scheme is materially indistinguishable from the one in Virginia the Court branded a "classic illustration of price fixing" in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 783 (1975).

It is also materially indistinguishable from the scheme that Florida's Supreme Court held violated the substantive due process rights guaranteed by ar-

ticle I, section 9 of the Florida Constitution. *Chicago Title Ins. Co. v. Butler*, 770 So.2d 1210 (Fla. 2000).

B. Some 80 to 85 Percent of the Title Insurance "Premium" Goes to the Title Agent

Title insurance and title insurance rates are subject to ostensible regulation in Texas. Tex. Ins. Code § 27053.151(a). The defined "business of title insurance" in Texas is not limited to title insurance *per se*, but is much broader and includes a host of other "services" and activities. Paragraph "q" of "P-1. Definitions" in Section IV (Procedural Rules and Definitions) of the Texas Department of Insurance's "Title Insurance Basic Manual" defines it as:

> ... the transacting or proposing to transact, any phase of title insurance, including solicitation, title examination, *except when conducted by an attorney*, closing the transaction, *except when conducted by an attorney*, execution of a contract of title insurance, insuring and transacting matters subsequent to the execution of the contract and arising out of it, including reinsurance; (3) the making of a guaranty or warranty of a title search, a title examination, or any component thereof by a person other than the one performing the search or examination; or (4) the doing or proposing to do, any business in substance equivalent to any of the foregoing whether or not designed to evade the provisions of Title 11, Insurance Code.

[http://www.tdi.state.tx.us/title/titlem4a.html#q.The%20business%20of%20title%20insurance (emphasis added) (accessed August 25, 2008.]

The Commissioner of Insurance prescribes the premium rate for title insurance (*i.e.*, how much the

title insurer or the agent on its behalf is permitted to charge the policyholder per $1,000 of coverage), as well as the division of the premium between the title insurer and the title agent. Tex. Ins. Code Arts. 9.07(b), (c), 9.30(B)(1) [§§ 2703.151(a), 2703.203-.205, 2703.207-.208, 2502.053-.055.]

As the Texas Supreme Court noted in *First American Title Insurance Co. v Combs, Comptroller of Public Accounts,* 258 S.W.3d 627, 630 (Tex. 2008), the Texas Department of Insurance from 2000 to 2002 "allowed agents to keep 85% of premiums collected from policyholders and remit the remaining 15% to the insurer." *See* 28 Tex. Admin. Code § 9.1 (adopting Basic Manual of Rules, Rates, and Forms for the Writing of Title Insurance in Texas and specifying a 15/85 split of the premium between insurer and agent), *see* http://www.tdi.state.tx.us/title/titlem4d.html#P-23 (accessed August 25, 2008).

> So what are you buying when you purchase title insurance? Most of all, you're paying for the services of the title agent who researches abstracts or actual deed records, lawsuits, tax records, mechanics' liens and the like to assure that nobody else has an ownership claim against the property. More than 80 percent of your title insurance premium goes to the agent to pay for these services.

[http://www.austinsmartconsumer.com/home/mortgage-title-insurance.php (accessed August 25, 2008).]

C. There Is No Relationship Between the Services a Title Agent Actually Performs and the Agent's Split of the "Premium"

The published 2008 rate sheet for the first-named defendant in this case, Alamo Title Company, lists

the rates for title insurance in $500 increments from $10,000 to $100,000. The "basic premium" goes from $229 to $843. Assuming an 85%-15% split between the agent and the insurance company, the agent's portion goes from $195 to $717.

For policies above $100,000, there is an escalating scale. At the bottom – for policies from $100,001 to $1 million – the premium is calculated as follows:

(1) Subtract $100,000 from policy amount. Multiply result in 1.(1) by $.00534.
(2) Round to the nearest whole dollar.
(3) Add $843 to result in 1.(2).

For a $1 million policy, the customer would therefore pay $5,649. The agent would receive $4,806.50. At the top tier – for policies in excess of $25 million – the premium is calculated as follows:

(1) Subtract $25,000,000 from policy amount.
(2) Multiply result in 1.(1) by $.00154. Round to the nearest whole dollar.
(3) Add $85,109 to result in 1.(2).

For a $26 million policy, the customer would therefore pay $125,149. The agent would receive $106,377.

On its face, there is no relationship between what the agent will be required to do to research the title and close the transaction and these set dollar amounts. Some properties will have straightforward title records. Others may require more work on the part of the agent. It would be one thing if the customer and the agent could negotiate the agent's fee, based on an arms' length understanding of just what the agent would have to do. But the agent's "take" is set in stone and has no correlation between what he or she will need to do to have the policy issued and

the deed recorded. Nor is it any answer to say that, on average, the agent will receive a fair wage for his or her work overall. This is naked price-fixing.

D. The Title Company and the Agent Are Free to Negotiate The Split of the "Premium"

Although the consumer has no choice in the premium he or she pays for both the nominal cost of title insurance and the agent's "services" or whatever else the agent might do, the agent and the title insurance company can negotiate the actual amounts they split based on their own arms' length agreement on what they consider to be fair and reasonable.

"P-22. Payment of a Fee for Examination and/or Closing" in Section IV (Procedural Rules and Definitions) of the Texas Department of Insurance's "Title Insurance Basic Manual" provides in pertinent part that payment "for examination of a title and/or closing a transaction" can be made to persons "legally authorized to perform such services," including a licensed attorney, but only if the payment is "commensurate with the services actually performed.

Tex. Ins. Code § 2502.053 also permits:

> (1) payment for services actually performed by a title insurance company, title insurance agent, or direct operation in connection with title examination or with closing the transaction or furnishing title evidence if:
>
> (A) the payment does not exceed the percentage of premium or other amount established by the commissioner for the payment; and
>
> (B) the person receiving the payment is licensed as provided by this title;
>
> (2) payment of bona fide compensation to a bona fide employee principally employed by a title

insurance company, title insurance agent, or direct operation;

(3) reasonable payment for goods or facilities actually provided and received; or

(4) payment for services actually performed by an attorney in connection with title examination or with closing the transaction, if the payment does not exceed a reasonable charge for the services.

The result is that, as between title insurance company, on the one hand, and title agent, title company employee or title attorney, on the other, the parties are free to determine (a) what constitutes a payment "commensurate with the services actually performed," (b) what are "reasonable charges for such services," (c) what is "bona fide compensation" and (d) whether the payment "does not exceed a reasonable charge for the services."

But the actual amount the consumer pays as "premium" remains set in concrete and he or she has no ability to negotiate what he or she thinks is a "reasonable" charge "commensurate with the services actually performed."

E. The Result Is that Texas's Title Insurance "Premiums" Are the Highest in the Country

The feature article in the October 2005 issue of *Texas Real Estate Business* was an interview with Bruce Liesman, president of the Texas Land Title Association, and Bob Massad, division president in the Dallas office of North American Title Company, discussing "Texas' seemingly high costs for title insurance."[http://www.texasrebusiness.com/articles/OCT05/feature2.html (accessed August 25, 2008).]

When the interviewer noted that "Texas [is] the highest premium state in the nation" and asked "[h]ow does this perception affect the title insurance business?" Mr. Liesman responded:

> ... Most attempted comparisons are not of apples to apples. The rates in each state are set under guidelines and customs unique to that state. The all-inclusive premium in Texas includes the charges for multiple services including "title insurance," while those services in most other states are generally separate and the "title insurance piece" carries its own charge. In those areas, there also may be separate charges for title abstracting, examination, escrow, settlement services, etc. There is no reliable actuarial evidence that confirms that the all-inclusive premium in Texas exceeds the collective fees charged in other states.

There is, however, no "reliable actuarial evidence" that the premiums charged in Texas are anything other than the result of a collusive conspiracy among the title insurers and their agents to set, not only the price of title insurance itself, but also the numerous other fees, charges, "services" and the like that a customer has to pay to obtain title insurance – fees, charges and "services" that customers in other states can bargain for based on arms' length, informed negotiations. *See, e.g., U.S. v. Title Ins. Rating Bur. of Arizona,* 700 F.2d 1247 (9th Cir. 1983) (joint setting of rates for title insurance escrow services is not the "business of insurance" and is a *per se* antitrust violation).

The result is that title insurance costs more in Texas than anywhere else in the United States. It is, as Mr. Liesman put it, "not apples to apples." To car-

ry the analogy forward, in Texas, what other states ordinarily consider to be "oranges" – title insurance premiums – have become part of the excessive cart of ancillary insurance "apples," "pears" and other varieties of fruit the consumer is required to pay for to obtain title insurance when buying a house or other real property.

F. Inflated Title Insurance Rates Are the Result of Kickbacks and "Reinsurance" Schemes

Consumers in Texas are not benefitted by this scheme. There is a plethora of reliable evidence that the premiums charged in Texas include kickbacks and other forms of unlawful "incentives" as part of the rate base.

J. Robert Hunter is a former Texas Insurance Commissioner. He testified on April 26, 2006 on "Title Insurance Cost and Competition" before the House Committee on Financial Services, Subcommittee on Housing and Community Opportunity. [http://www.consumerfed.org/pdfs/title_insurance_testimony042606.pdf (accessed August 25, 2008).]

Mr. Hunter pointed out that "[t]he real estate intermediaries have incentives to allow the title policies to become more expensive because the added costs are merely passed on to the buyers and because higher cost policies generate higher rebates, referrals or other financial inducements from the title insurer." [*Id.* (at 7).] He also noted how the title insurance companies use "captive reinsurance" to make kickbacks to homebuilders of almost 50 percent of the premium." [*Id.* (at 9).] *See also Edwards v. First American Corp.,* No. 08-56536 (9th Cir., June 21, 2010) (describing similar illegal "exclusive" agency agreement kickback schemes to refer title insurance business).

In Texas, these "reinsurance" payments are subject to no regulation. *See* Tex. Ins. Code § 2703.151 (b) ("The commissioner may not fix or promulgate the premium rates for reinsurance between title insurance companies. Title insurance companies may establish the premium rates in amounts to which the companies agree"). But the consumer ends up paying for them.

REASONS FOR GRANTING THE WRIT

A. The Fifth Circuit's Decision Creates a Division Among the Federal Courts of Appeals on an Important Issue Governing the Relationship Between Federal and State Competition and Consumer Protection Law.

The First Circuit cautioned in *Arroyo-Melecio v. Puerto Rican American Ins. Co.*, 398 F.3rd 56, 73 (1st Cir. 2005), that the "filed rate" doctrine is "a famously complex and sometimes criticized set of rules. *See Town of Norwood v. New England Power Co.*, 202 F.3d 408, 420 (1st Cir. 2000) ("[T]he law on the filed rate doctrine is extremely creaky.")." *See also Blaylock v. First American Title Ins. Co.*, 504 F. Supp. 2nd 1091, 1100 (W.D. Wash. 2007) ("the doctrine has been repeatedly called into question"); IA AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 247b, at 419 (3d ed. 2006) ("the best policy is generally to construe irrational doctrines narrowly and, as the Supreme Court virtually conceded in *Square D*, the filed rate doctrine in antitrust is in large measure irrational and justifiable only on grounds of stare decisis").

Regardless of its application in other settings, and in other regulatory regimes, it does not apply here to insulate the defendant title companies from their unlawful conduct.

The Fifth Circuit's decision below ignored the fact that whether or not the "filed rate" doctrine applies to petitioners' state law claims depends on Texas state law, not federal law. *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3rd 979, 992 (9th Cir. 2000); *Blaylock*, 504 F. Supp. 2nd at 1101.

As the Ninth Circuit underscored in *Knevelbaard Dairies*, this distinction is critical:

> The filed rate doctrine originated in *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922), where the Court held that a private shipper could not recover treble damages against railway companies that had set uniform rates duly filed with, and approved by, the Interstate Commerce Commission. Two rationales were offered. First, the regulatory scheme allowed the recovery of damages for illegal rates in proceedings before the ICC; Congress presumably would not have intended a second remedy. Second, carrier rate regulation was primarily intended to prevent the charging of discriminatory rates, an objective which would be disserved by affording antitrust recovery to some shippers but not all. Although the doctrine has been questioned by many including the Supreme Court itself, it lives on to a limited extent. *See Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986); *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218, 234 (1994). Where damages are sought under the federal antitrust laws, the doctrine may preclude relief if the challenged rates or prices were set by either federal or state regulatory authorities. *See Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17 (2d Cir. 1994). Where damages are sought under a state law, it may apply if the

challenged rates or prices were set by a federal regulatory authority. *See, e.g., Duggal v. G. E. Capital Communications Serv.,* 81 Cal. App. 4th 81, 87-88 (2000); *County of Stanislaus v. Pacific Gas & Elec. Co.,* 114 F.3d 858, 866 (9th Cir. 1997) ("[T]he filed rate doctrine bars all claims - state and federal - that attempt to challenge a rate that a federal agency has reviewed and filed.")

This case, however, involves only a state antitrust law being applied where an agency of that state has set a commodity price that, according to the complaint, was wrongfully depressed by manufacturers who collusively manipulated data submitted to and used by the agency. Whether damages can be awarded to the injured parties is a matter of state law. California has held, in contrast to federal law, that no filed rate doctrine exists as a bar. In *Cellular Plus, Inc., v. Superior Court,* 14 Cal. App. 4th 1224 (1993), the defendant telephone service providers contended that the filed rate doctrine shielded them because the prices they charged for service - prices which the plaintiffs claimed were the result of a horizontal price-fixing conspiracy - had been filed with and approved by the California Public Utilities Commission. *Id.* at 1240. The state court agreed that the filed rate doctrine would avail defendants if it applied, but held that under the Cartwright Act no such doctrine would bar recovery:

> [W]e find no compelling underlying logic or policy reasons for denying a Cartwright Act cause of action for treble damages to a person injured by reason of a price fixing conspiracy, even if the fixed prices had been approved as reasonable by a regulatory agency.

Id. at 1241-42.

In contrast, both the district court and the Fifth Circuit ignored this key distinction and looked solely to the federal "filed rate" doctrine to bar not only the plaintiffs' federal antitrust claims, but their Texas state law claims as well.

This Court should grant certiorari to clarify this important issue and, we respectfully submit, find that the federal filed rate doctrine, whatever its role may be in disallowing federal antitrust claims, cannot pretermit viable and important state law claims where the state itself has not barred them.

B. Petitioners Have Valid Claims Under Texas Law that Are Not Barred by a "Filed Rate."

The failure of the Fifth Circuit even to address the petitioner's claims under Texas law is critical. The petitioners here are not asking this Court to address them, but merely that it remand to the Fifth Circuit with instructions that it address them (or if it is in doubt, to certify them to the Texas Supreme Court for a definitive ruling).

1. Texas's "Filed Rate" Doctrine Allows Petitioners to Challenge the Rate's Reasonableness.

As Texas's Supreme Court stressed in *Mid-Century Ins. Co. v. Ademaj,* 243 S.W.3rd 618, 625 (Tex. 2007) (emphasis added),

> ... while Ademaj is correct that the filed rate doctrine applies in Texas, *Southwestern Elec. Power Co. v. Grant,* 73 S.W.3rd 211, 216-17 (Tex. 2002), he ... is wrong about how the filed rate doctrine applies in Texas. ... We held in *Southwestern Electric Power Co.* that "[t]he doctrine holds that a tariff filed with and approved by an administrative agency under a

statutory scheme is presumed reasonable *unless a litigant proves otherwise.*"

The complaint demonstrates that the title insurance rates charged in Texas are patently unreasonable. The plaintiffs should be given an opportunity to challenge them. Not only are the complaint's allegations "plausible," they have repeatedly been confirmed by numerous independent sources, including a former Texas Insurance Commissioner.

2. Texas Title Insurance Violates the State Constitution's Due Course of Law Clause.

To the extent that Texas's title insurance scheme seeks to insulate the defendants from liability for this conduct, it violates the Texas Constitution. In *Chicago Title Ins. Co. v. Butler*, 770 So.2d 1210 (Fla. 2000), the Florida Supreme Court held that Florida provisions that are virtually identical in effect to the ones the title companies here rely on to insulate themselves from liability violated the plaintiff homeowner's substantive right to due process.

As with Texas title insurance, Florida's Administrative Code prohibited title insurance agents from negotiating or rebating to clients any portion of the risk premium charged for issuance of title insurance. *Id.* at 1213. As with Texas title insurance, Florida's Insurance Code required that the title insurance agent receive the lion's share (70%) of the risk premium. *Id.*

The Florida Supreme Court reaffirmed its earlier ruling in *Department of Insurance v. Dade County Consumer Advocates Office*, 492 So.2d 1032 (Fla. 1986), that anti-rebate statutes were an unconstitutional infringement on the public's right to effective

bargaining power with those from whom they wish to purchase services.

The Florida court rejected the argument that "if title agents are allowed to negotiate the amount of the premium they collect, they will be forced to cut corners in order to remain competitive with other title agents, thereby jeopardizing the quality and level of skill necessary to perform the underwriting services." *Id.* The court pointed out that this Court had rejected this same argument in *Virginia Pharmacy Board v. Virginia Consumer Council,* 425 U.S. 748 (1976), holding unconstitutional Virginia's ban on drug price advertising because it deprived consumers of information they were entitled to know in purchasing drugs.

As the Florida court underscored, "the possibilities of such abuse cannot serve to suppress bargaining or information which might otherwise lead to an informed choice." 770 So.2d at 1219.

The Florida court also noted that attorneys who perform title services were (a) exempt from the licensing requirements of Florida law and (b) not required to abide by the law's anti-rebate provisions, so that homeowners were free to negotiate fees with them. 770 So.2d at 1220. The same is true in Texas. *See* Tex. Ins. Code § 2501.005(a) (the "business of title insurance" excludes work "by an attorney"), § 2652.003(a) ("Notwithstanding Section 2652.001, an attorney is not required to be licensed as an escrow officer to perform the duties of an escrow officer as defined by Section 2501.003"). But rates charged Texas homeowners are the same regardless of whether the solicitation, title examination and closing are done by an attorney or a non-attorney title agent.

Article I, § 19 of the Texas Constitution provides that "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." The applicable "due course of the law" principles are summarized in *National Collegiate Athletic Association v. Yeo,* 114 S.W.3d 584 (Tex. App. - Austin [3rd Dist.] 2003), *reversed on other grounds,* 171 S.W.3d 863 (Tex. 2005):

> While the Texas version differs somewhat from the United States Constitution's guarantee of "due process," both documents protect the same legal interests without meaningful distinction. *See University of Tex. Med. Sch. v. Than,* 901 S.W.2d 926, 929 (Tex. 1995); *Mellinger v. City of Houston,* 3 S.W. 249, 252-53 (Tex. 1887).
>
> . . .
>
> Procedural due process is necessary when a property or liberty interest protected under article I, section 19, is threatened by government action. *Than,* 901 S.W.2d at 929. In describing property interests, the courts have tended to discuss the degree to which the government's action regarding property is restricted by operation of state law. *See Grounds v. Tolar Indep. Sch. Dist.,* 856 S.W.2d 417, 419-20 (Tex. 1993) (government employees' entitlement to continued employment based on degree to which statute restricted government's discretion to fire them). The United States Supreme Court has stated that a liberty interest:
>
> > [D]enotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the

> common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of one's own conscience and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.

Board of Regents of State Colleges v. Roth, 408 U.S. 564, 572 (1972) (*citing Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

The Texas Supreme Court has followed the Florida Supreme Court in similar situations. *See, e.g., Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988) (legislative caps on damages violated Texas's "due course of law" provision). There is no reason to believe it would not do so here.

3. **The Texas Insurance Code Authorizes the Plaintiffs' Suit.**

The Texas Insurance Code authorizes private lawsuits, including class actions, for purchasers of title insurance who have been damaged by unlawful methods, acts or practices – including concerted action that results in or tends to result in the unreasonable restraint of or a monopoly in the business of insurance or making false statements in financial records submitted to the Texas Insurance Department. *See* Texas Ins. Code §§ 541.003, .054, .055, .061, .151, .152, .251, .252, 2551.001(c)(3).

4. **The Title Companies' Rebates Are Illegal Under the Texas Insurance Code.**

Tex. Ins. Code § 2502.051 provides that "[a] commission, rebate, discount, portion of a title insurance premium, or other thing of value may not be di-

rectly or indirectly paid, allowed, or permitted by a person engaged in the business of title insurance or received or accepted by a person for engaging in the business of title insurance or for soliciting or referring title insurance business."

5. **The Title Companies' Conduct Violates the Texas Free Enterprise and Antitrust Act.**

The Texas Free Enterprise and Antitrust Act, Tex. Bus. & Com. Code §§ 15.01-.26 (the "Texas Antitrust Act") is modeled after the Sherman and Clayton Acts. *Caller-Times Publishing Co. v. Triad Communications, Inc.*, 826 S.W.2d 576, 579-80 (Tex. 1992). The Texas Act is to be "construed ... in harmony with federal judicial interpretations of comparable federal antitrust statutes." Tex. Bus. & Com. Code § 15.04.

The bottom line is that the filed rate doctrine does not insulate the defendants' conduct from challenge under Texas's antitrust laws. *See Knevelbaard*, 232 F.3rd at 992 (no filed rate defense where state law does not provide for one).

Although § 15.05(g) of the Texas Antitrust Act exempts "actions required or affirmatively approved by any statute of this state . . . or by a regulatory agency of this state . . . acting under . . . statutory authority," Texas has not only not expressly or affirmatively approved defendants' unlawful kickbacks and other unlawful conduct, but it (a) expressly bars them, (b) provides numerous causes of action to redress them and (c) has undertaken enforcement actions to prevent them.

6. The Title Companies' Conduct Also Violates the Texas Deceptive Trade Practices Act.

The Texas Deceptive Trade Practices-Consumer Protection Act, Tex. Bus. & Com. Code §§ 17.41 *et seq.* ("DTPA"), provides a cause of action for consumers where (1) the defendant engaged in false, misleading, or deceptive acts and (2) these acts constituted a producing cause of the consumer's damages. Tex. Bus. & Com. Code § 17.50(a)(1); *Doe v. Boys Clubs of Greater Dallas,* 907 S.W.2d 472, 478 (Tex. 1995). A DTPA claim may also arise from the breach of express or implied warranties or from any unconscionable action or course of action. Tex. Bus. & Com. Code §17.50(a)(2)-(3).

The Texas courts have held, as a matter of law, that "the term 'services' includes the purchase of an insurance policy" and that a purchaser of title insurance can be a consumer under the DTPA. *See 3Z Corp. v. Stewart Title Guaranty Co,* 851 S.W.2d 933, 936-37 (Tex. App. - Beaumont 1993, writ denied); *see also Kuper v. Stewart Title Guaranty Co.,* 2002 Tex. App. LEXIS 3486 (Tex. App. – Houston [1st Dist.] May 16, 2002) ("The term "services" includes the purchase of insurance policies').

The failure to disclose that agency commissions and kickbacks were embedded in title insurance premiums is actionable. *See 3Z Corp.*, 851 S.W.2d at 936-37; *Woods v. Mercer*, 769 S.W.2d 515 (Tex. 1989) (insurance company's failure to inform insured that insurance company had withdrawn agent's authority to provide endorsement to policies); *see generally Doe v. Boys Club of Greater Dallas, Inc.,* 907 S.W.2d at 478 (omissions). "[T]he DTPA's purpose is 'to protect consumers against false, misleading, and deceptive business practices.'" *First Title Co. of Waco v.*

Garrett, 860 S.W.2d 74, 77 (Tex. 1993), citing Tex. Bus. & Com. Code § 17.44. The failure to disclose material information is just as actionable as affirmative misrepresentations. *Aetna Cas. & Sur. Co. v. Martin Surgical Supply Co.*, 689 S.W.2d-263, 269 (Tex. App. - Houston [1st Dist.] 1985).

The defendants' conduct qualifies as an "unconscionable action or course of action" – "an act or practice which, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree." Tex. Bus. & Com. Code § 17.45(5).

And it violates Tex. Ins. Code. art. 21.21 § 16, which provides for a recovery of damages for any act defined by Tex. Bus. & Com. Code § 17.46 to be an unlawful deceptive trade practice. *See Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 383-87 (Tex. 2000); *Royal Globe Ins. Co. v. Bar Consultants*, 577 S.W.2d 688, 691 (Tex.1979); *Stewart Title Guaranty Co. v. Sterling*, 772 S.W.2d 242 (Tex.App. - Houston [14th Dist.] 1989), *rev'd on other grounds*, 822 S.W.2d 1 (Tex. 1991).

7. **None of the Title Insurers' Conduct Is Immune Under Texas Law.**

Because the defendants' conduct squarely violates Texas law, it cannot be immune from challenge under the "filed rate" doctrine. *Knevelbaard,* 232 F.3rd at 992 (the doctrine depends on whether the conduct is immune from attack under state law, not merely whether there is a filed state rate).

The Court should therefore grant the writ to clarify and confirm that as a matter of federal law, where a state has not barred a cause of action – whether under its own antitrust laws, its insurance laws or

its consumer protection laws – there cannot be any bar to the enforcement of these laws merely because there has been some state "rate setting" involved in the underlying congeries of fact.

C. **The Fifth Circuit's Decision Failed to Address or Refer Governing Issues of Law to the Texas Supreme Court for a Definitive Ruling.**

The Texas Antitrust Act seeks to provide a level playing field to benefit the consumers of the state. *Caller-Times Pub. Co. v. Triad Comm'ns, Inc.*, 826 S.W.2nd 576, 581 (Tex. 1992). California's antitrust law was taken from both Texas's and the federal antitrust laws. *Knevelbaard Dairies*, 232 F.3rd at 985. As with both Texas and federal antitrust law, California's antitrust law (Cal. Bus. & Prof. Code, § 16700 *et seq.*) was "enacted to promote free market competition and to prevent conspiracies or agreements in restraint or monopolization of trade." *Exxon Corp. v. Superior Court,* 51 Cal.App 4th 1672, 1680 (1997).

In light of the federal "filed rate" doctrine's "creaky" pedigree, *Town of Norwood*, 202 F.3d at 420, and this Court's own skepticism about its current utility, *see Square D Co. v. Niagara Frontier Tariff Bureau, In.*, 476 U.S. at 416-422, the Texas Supreme Court could well determine, as California's courts have done, that there are "no compelling underlying logic or policy reasons for denying [an antitrust] cause of action for treble damages to a person] injured by reason of a price fixing conspiracy, even if the fixed prices had been approved as reasonable by a regulatory agency." *Cellular Plus, Inc. v. Superior Court,* 14 Cal.App.4th 1224, 1241-42 (Cal. App. 1993).

As the California appellate court put it,

> . . . the strong public policy of [California's antitrust act] encouraging free and open competition and competitively established prices applies even to companies regulated by the PUC. If we were to deny [the plaintiff] a cause of action merely because the PUC had approved the prices as "reasonable" while ignorant of the alleged price fixing agreement, we would implicitly be encouraging regulated companies to engage in anticompetitive price fixing activities by reason of denying plaintiffs the major private enforcement threat of treble damages under the [antitrust act].

Id., at 1243.

Given its holding in *Mid-Century Ins. Co. v. Ademaj* differentiating Texas's "filed rate" doctrine from the federal doctrine, the Texas Supreme Court should be given an opportunity to flesh out the contours of the state's particular "filed rate" doctrine.

The Texas Constitution, art. V, § 3-c, authorizes and Texas Supreme Court Rule 58.1 provides that "[t]he Supreme Court of Texas may answer questions of law certified to it by any federal appellate court if the certifying court is presented with determinative questions of Texas law having no controlling Supreme Court precedent." *See Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988) (holding that statutory damages limitations violate the Texas Constitution).

The complaint alleges serious violations of law that affect virtually every homeowner and purchaser of a house or other property in Texas. That the title insurance scheme in Texas is irrational on its face and the inflated costs of title insurance in the state

are disproportional to any rational scheme of insurance – not to mention the highest in the country – should militate against insulating the defendants from liability.

There appears to be no controlling Fifth Circuit precedent that would bar the plaintiffs' claims, and there certainly is no controlling precedent from the Texas Supreme Court.

The plaintiffs therefore requested that the Fifth Circuit certify the following questions of law to the Texas Supreme Court under Rule 58.1:

> Are the plaintiffs' claims barred by the filed rate doctrine?
>
> Does the Texas title insurance scheme violate the "due course of law" provisions of Article I, § 19 of the Texas Constitution.
>
> Are the defendants' actions per se violations of Bus. & Com. Code §§ 15.01-.26?
>
> Does the complaint state a valid cause of action under the Texas Deceptive Trade Practices-Consumer Protection Act, Tex. Bus. & Com. Code §§ 17.41 et seq.?
>
> Does the complaint state a valid cause of action for the defendants' violations of the anti-kickback and other provisions of the Texas Insurance Code, §§ 2502.051, 2502.052 and 2502.055?

The petitioners raised these issues in the district court and presented them again on appeal, including asking that the court of appeals refer them to the Texas Supreme Court for an authoritative decision. The Fifth Circuit's brief opinion did not rule on or even mention this request. This Court, however, has repeatedly reaffirmed that the proper course in simi-

lar circumstances is to certify controlling questions to the highest state court for a definitive state law ruling.

In *Bellotti v. Baird*, 428 U.S. 132, 150-151 (1976), the Court stated that "the availability of an adequate certification procedure 'does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism.' *Lehman Brothers v. Schein,* 416 U.S. 386, 391 (1974). This Court has utilized certification procedures in the past, as have courts of appeals. *Ibid.* and cases cited therein at 390 nn. 5 and 6. "

The Court has not hesitated to refer a broad array of key state law issues to the states' highest courts. *See, e.g., U.S. v. Male,* No. 09-940, Slip Op. at 3 (U.S. June 7, 2010); *Toll v. Moreno*, 441 U.S. 458, 459 (1979); c*f. Fiess v. State Farm Lloyds,* 392 F.3d 802, 810-11 (5th Cir. 2004) ("the better approach, given the significance of the issue, is to certify the question to the only court that can settle this uncertainty with finality").

Before the federal courts, exercising supplementary or ancillary jurisdiction over important state law causes of action, dismiss those causes of action based on a wholly federal construct such as the "filed rate doctrine," they should first obtain the state courts' guidance on whether, as a matter of state law, the claims would be barred.

The Court should therefore grant the writ to clarify and give guidance to the lower federal courts on when they should use available state court certification mechanisms to decide important, unresolved issues of state law.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

June 2010

Loren Kieve
Counsel of Record
KIEVE LAW OFFICES
5A Funston Avenue
The Presidio of San Francisco
San Francisco, California 94129
(415) 364-0060
LK@KIEVELAW.COM

William S. Shepherd
SHEPHERD SMITH & EDWARDS LLP
1010 Lamar Street, Suite 900
Houston, Texas 77002
(713) 227-2400
WSS@SSELAW.COM

Louis F. Burke
LOUIS F. BURKE, P.C.
460 Park Avenue, 21st Floor
New York, New York 10022
(212) 682-1700
LBURKE@LFBLAW.COM

Christopher J. Gray
LAW OFFICE OF CHRISTOPHER J. GRAY, P.C.
460 Park Avenue, 21st Floor
New York, New York 10022
(212) 838-3221
GRAY@CJGRAYLAW.COM

Krishna B. Narine
LAW OFFICE OF KRISHNA B. NARINE
2600 Philmont Avenue
Huntington Valley, Pennsylvania 19006
(215) 914-2460
KNARINE@KBNLAW.COM

Attorneys for Petitioners

Appendix

Opinion of the Fifth Circuit .....App. 2
Judgment of the Fifth Circuit .....App. 6
Order of the district court .....App. 8

United States Court of Appeals
Fifth Circuit
F I L E D
March 30, 2010
Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-50511

CHRISTOPHER WINN, on behalf of himself and all others similarly situated;
WILLIAM CUMMINGS, on behalf of himself and all others similarly situated;
CHRISTOPHER VILLEMARETTE, on behalf of himself and all others similarly
situated; NATALIE CUMMINGS, on behalf of himself and all others similarly
situated,

Plaintiffs - Appellants

v.

ALAMO TITLE INSURANCE COMPANY; FIDELITY NATIONAL TITLE INSURANCE COMPANY; CHICAGO TITLE INSURANCE COMPANY; TICOR TITLE INSURANCE COMPANY; FIDELITY NATIONAL FINANCE, INC; FIRST AMERICAN TITLE INSURANCE COMPANY OF NEW YORK; UNITED GENERAL TITLE INSURANCE COMPANY; FIRST AMERICAN CORPORATION; COMMONWEALTH LAND TITLE INSURANCE COMPANY; LAWYERS TITLE INSURANCE CORPO-

RATION; LANDAMERICA FINANCIAL GROUP, INC; STEWART TITLE INSURANCE COMPANY; STEWART INFORMATION SERVICES CORPORATION,

Defendants – Appellees

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:09-CV-214

Before DAVIS, WIENER, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Plaintiffs are Texas homeowners who purchased title insurance from one or more of the Defendant companies. The homeowners complain that they were charged artificially inflated rates as a result of a price-fixing scheme. In Texas, the rates for title insurance are set by the Commissioner of Insurance. Title insurance companies are required to charge these rates.

On April 3, 2008, the homeowners filed this suit as a class action in the United States District Court for the Eastern District of Texas. The case was later transferred to the Western District. No class certification has apparently issued.

---

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

The homeowners insist that the companies' actions constitute a *per se* price-fixing scheme in violation of the Sherman Act. *See* 15 U.S.C. § 1. They also allege that the companies violated the Texas Deceptive Trade Practices Act and the Texas Free Enterprise and Antitrust Act. They also make certain common law claims.

In August of 2008, the title insurance companies jointly moved to dismiss the complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Among the allegations was that the federal and state claims were barred by the "filed-rate doctrine," which precludes actions against private entities for charging a rate set by the appropriate regulating authority.

On May 14, 2009, the district court dismissed on the sole basis that the filed-rate doctrine barred each claim. The homeowners timely appealed.

The filed-rate doctrine prevents state-regulated enti ties from charging rates other than those mandated by the proper authority. *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981). The doctrine also prohibits suits by customers against entities charging government-prescribed rates. *Keogh v. Chicago & Nw. Ry., Co*, 260 U.S. 156, 162-65 (1922).

The homeowners assert three reasons the filed-rate doctrine does not bar their claims: (1) applying the filed-rate doctrine to the companies' alleged antitrust violations is contrary to Texas law; (2) the Texas Insurance Commissioner's authority is too limited to justify application of the filed-rate doctrine; and (3)

the companies' conduct violated federal and state antitrust law, making the filed-rate doctrine inapplicable.

In addition, the homeowners make various constitutional and state law arguments. Finally, they allege that they were improperly denied a right to amend their complaint.

After a review of the record and the briefs filed on appeal, we conclude, largely for the reasons expressed by the district court, that the filed-rate doctrine bars each of the homeowners' claims. None of the arguments that would allow evading that doctrine has merit.

We AFFIRM.

United States Court of Appeals
Fifth Circuit
F I L E D
March 30, 2010
Charles R. Fulbruge III
Clerk

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 09-50511

CHRISTOPHER WINN, on behalf of himself and all others similarly situated;
WILLIAM CUMMINGS, on behalf of himself and all others similarly situated;
CHRISTOPHER VILLEMARETTE, on behalf of himself and all others similarly
situated; NATALIE CUMMINGS, on behalf of himself and all others similarly
situated,

Plaintiffs - Appellants

v.

ALAMO TITLE INSURANCE COMPANY; FIDELITY NATIONAL TITLE INSURANCE COMPANY; CHICAGO TITLE INSURANCE COMPANY; TICOR TITLE INSURANCE COMPANY; FIDELITY NATIONAL FINANCE, INC; FIRST AMERICAN TITLE INSURANCE COMPANY OF NEW YORK; UNITED GENERAL TITLE INSURANCE COMPANY; FIRST AMERICAN CORPORATION; COMMONWEALTH LAND TITLE INSURANCE COMPANY; LAWYERS TITLE INSURANCE CORPO-

RATION; LANDAMERICA FINANCIAL GROUP, INC; STEWART TITLE INSURANCE COMPANY; STEWART INFORMATION SERVICES CORPORATION,

Defendants – Appellees

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:09-CV-214

Before DAVIS, WIENER, and SOUTHWICK, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

FILED
2009 MAY 14 AM 11:26
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY /S/_____

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CHRISTOPHER WINN,
ET AL.,
Plaintiffs

-vs- Case No. A-09-CA-214-SS

ALAMO TITLE INSU-
RANCE COMPANY, ET AL.,
Defendants

ORDER

Before the Court are Defendants' Joint Motion to Dismiss the Amended Complaint With Prejudice and Supporting Memorandum of Legal Authorities, filed August 4, 2008 [#24];[1] Plaintiffs' Opposition to Defendants' Motion to Dismiss, filed September 17, 2008 [#29]; and Defendants' Reply Memorandum of Legal Authorities in Further Support of Defendants'

[1] This action was originally filed in the Beaumont Division of the Eastern District of Texas on April 3, 2008, The case was transferred to this Court on March 26, 2009. The docket numbers refer to the numbers originally used in the Eastern District of Texas.

Joint Motion to Dismiss the Amended Complaint With Prejudice, filed September 29, 2008 [#30]. Having considered the motion, response and reply thereto, the case file as a whole and the applicable law, the Court enters the following opinion and orders.

I. Background

Plaintiffs Christopher Winn, Natalie Cummings and Chris K. Villemarette bring this action on behalf of themselves and others similarly situated. They have named as defendants Alamo Title Insurance Company, Fidelity National Title Insurance Company, Chicago Title Insurance Company, Ticor Title Insurance Company, Fidelity National Finance, Inc., First American Title Insurance Company of New York, United General Title Insurance Company, First American Corporation, Commonwealth Land Title Insurance Company, Lawyers Title Insurance Corporation, Landamerica Financial Group, Inc., Stewart Title Insurance Company, and Stewart Information Services Corporation. According to Plaintiffs, they are residents of Texas who purchased title insurance policies from the defendants. In sum, they complain the rates they were charged were artificially inflated by the improper actions of the defendants. (Am. Compl. ¶ 4).

Plaintiffs allege title insurance consumers generally exercise little discretion in choosing the title insurance company from whom they purchase title insurance, but rather rely on "middlemen" such as real estate agents, banks, lenders, builders and developers. Plaintiffs further allege title insurance companies pay financial enticements to such middlemen to steer business to the title insurance company. Plain-

tiffs acknowledge the Texas Department of Insurance sets rates for title insurance that must be charged by all sellers of title insurance in Texas. However, according to Plaintiffs:

> During the portion of the Class Period preceding April 2004, such payments and kickbacks were not expressly prohibited by the rules of the Texas Department of Insurance. During the Class Period such payments were included in the expenses reported by title insurers to the Texas Department of Insurance (although not characterized as such) in connection with its rate-setting. Therefore, throughout the Class Period such payments and kickbacks led directly to title insurance rates being set higher than they otherwise would be set.

(Id. ¶¶ 17-23).

Plaintiffs describe title insurance premiums as composed of two portions, the risk component and the agency commission. The risk component covers the risk the title insurance company bears for any undiscovered defects in the title. The agency commission portion covers payments made to title agents. According to Plaintiffs, a small piece of those payments is for the search of prior ownership records of the property to identify any issues with the title of the property. They allege:

> The remainder, and by far the bulk, of the agency commissions are comprised of costs unrelated to the issuance of title insurance. These costs include kickbacks and other financial inducements title insurers provide to title

> agents and indirectly (through title agents) to the lawyers, brokers, and lenders who, in reality, are the ones deciding which title insurer to use. These payments have nothing to do with the issuance of title insurance and are made by title insurers merely to inflate their revenues and steer business their way.

(Id. ¶¶ 24-27).

Plaintiffs additionally allege the Texas Department of Insurance has charged Commonwealth Land Title Insurance Company, Lawyers Title Insurance Corporation and Landamerlca Financial Group, Inc. (collectively "LandAmerica") with violations of the Texas Insurance Code. The alleged violations include paying, or allowing to be paid, commissions, rebates, discounts or other things of value to a person for engaging in, soliciting or referring the business of title insurance. *(Id. ¶* 46 & Ex. 1).

Plaintiff further allege Defendants have:

> engaged in concerted efforts to (i) cause the Texas Department of Insurance to set supra-competitive rates for title insurance in Texas (ii) include in their calculated rates agency commission costs, (iii) embed within these costs payoffs, kickbacks, and other charges that are unrelated to the issuance of title insurance, and (iv) report the costs of surreptitious payments to title agents to the Department of Insurance as expenses, which in turn has caused the Department of Insurance to

> set premium rates at a level higher than the level at which they otherwise would have been set.

(Id. ¶ 62). Plaintiffs contend, in the absence of proper regulatory authority and oversight,Defendants' conduct constituted a horizontal agreement to fix the form, structure and price of title insurance in Texas. *(Id. ¶* 63).

Plaintiffs first assert a cause of action for per se price fixing, in violation of the Sherman Act, 15 U.S.C. § 1. They allege the Defendants' conduct has caused substantial anticompetitive effects in the title insurance market, causing Plaintiffs to pay significantly more for title insurance than they would have in the absence of Defendants' illegal activity. *(Id. ¶¶* 82-87). They further claim the conduct of Defendants violates the Texas Deceptive Trade Practices Act ("DTPA"), TEX. Bus. & COM. CODE § 17.41 *et seq. (Id. ¶¶* 88-93). Plaintiffs also assert claims for violations of the Texas Free Enterprise and Antitrust Act, TEX. Bus. & COM. CODE § 15.01 *et seq. (Id. ¶¶* 94-98). Plaintiffs additionally assert a claim for money had and received, and finally a claim for disgorgement of unjust enrichment. *(Id. ¶¶* 99-103). As relief, Plaintiffs seek declaratory and injunctive relief, monetary damages, and disgorgement of unjust enrichment. *(Id.* at 28-29).

Defendants have now filed a motion to dismiss. They contend Plaintiffs' complaint should be dismissed because: (1) it fails to set forth factual allegations sufficient to state a claim for relief; (2) the filed rate doctrine bars all of Plaintiffs' claims; (3) the state action doctrine bars Plaintiffs' antitrust claim;

(4) the Court should abstain. from deciding Plaintiffs' request for injunctive relief under the *Burford* abstention doctrine; (5) the claims against the corporate parent defendants are insufficient to establish liability; (6) the state law antitrust claim also fails; (7) Plaintiffs are not entitled to relief as a matter of law under the DTPA; and (8) Plaintiffs cannot recover on their claims for equitable relief. The parties have filed responsive pleadings and the matters are now ripe for determination.

II. Standard of Review

A motion to dismiss under Rule 12(b)(6) "is viewed with disfavor and is rarely granted." *Lowrey v. Texas A&M Univ. Sys.,* 117 F.3d 242, 247 (5th Cir. 1997) (quoting *Kaiser Aluminum & Chemical Sales, Inc. V. Avondale Shipyards,* 677 F.2d 1045,1050 (5th Cir. 1982)). The complaint must be liberally construed in favor of the plaintiff and all facts pleaded therein must be taken as true. *Leatherman V. Tarrant County Narcotics Intelligence & Coordination Unit,* 507 U.S. 163, 164, 113 S. Ct. 1160, 1161 (1993); *Baker V. Putna/,* 75 F.3d 190, 196 (5th Cir. 1996). The Supreme Court has reminded lower courts, in order to survive a motion to dismiss, a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Swierkiewicz V. Sorema N.A.,* 534 U.S. 506, 122 S. Ct. 922, 998 (2002) (quoting FED. R. CIV. P. 8(a)(2)). Thus, a plaintiff is generally not required to plead facts supporting each and every element of his claim or legal theory. *Id.* Rather, a complaint is sufficient if it "give[s] the defendant fair notice of what the plaintiffs claim is and the grounds upon which it rests." *Id.* (quoting *Conley V. Gibson,* 355 U.S. 41,47,78 S.

Ct. 99, 103 (1957)). Dismissal is warranted only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley,* 355 U.S. at 45-46,78 S. Ct. at 102.

III. Analysis

Defendants have sought to dismiss Plaintiffs' complaint on a number of bases. The Court will address the filed rate doctrine first as matters at issue within this action fall squarely within the contours of the doctrine.

In essence, the filed rate doctrine forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate regulatory authority. *Arkansas La. Gas Co. v. Hall,* 453 U.S. 571, 577, 101 S. Ct. 2925, 2930 (1981). The Supreme Court established this doctrine in *Keogh v. Chicago & Northwestern Railway, Co.,* 260 U.S. 156,43 S. Ct. 47 (1922). The Court held In *Keogh* that a shipper could not bring an antitrust action against carriers in connection with tariffs paid because those tariffs had been filed and approved by the Interstate Commerce Commission. *Id.* at 163, 43 S. Ct. at 49. In so doing, the Court reasoned both that allowing the shipper to recover could result in affording him a "preference over his trade competitors" and would force the shipper to prove the charged rates were discriminatory or unlawful, a matter within the authority of the respective governmental agency to determine. *Id.* at 163-64, 43 S. Ct. 49-50.

Since *Keogh,* the Supreme Court has repeatedly applied the filed rate doctrine in a number of cases to

preclude lawsuits asserting claims directly or indirectly attacking rates filed with the appropriate regulating authority. *See, e.g., AT&T Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 226-26, 118 S. Ct. 1956, 1964-65 (1998) (state contract and tort claims seeking services contrary to filed tariff preempted under filed rate doctrine); *Maislin Indus. v. Primary Steel, Inc.*, 497 U.S. 116, 128, 110 S. Ct. 2759, 2767 (1990) (noting "[d]espite the harsh effects of the filed rate doctrine, we have consistently adhered to it"); *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424, 106 S. Ct. 1922, 1931 (1986) (squarely rejecting challenge to continued validity of decision in *Keogh); Arkansas La.* Gas, 453 U.S. at 577, 101 S. Ct. at 2930 (filed rate doctrine prohibits seller of natural gas from collecting rate different than one it filed with Federal Power Commission, noting doctrine has been extended across spectrum of regulated utilities). Federal circuit courts, including the Fifth Circuit, have also regularly applied the filed rate doctrine as a bar to litigation. *See, e.g., Crumley v. Time Warner Cable, Inc.*, 556 F.3d 879,881 (8th Cir. 2009) (suit barred by filed rate doctrine where damages sought would preclude defendant from charging challenged fee incorporated in filed rate); *Wah Chang v. Duke Energy Trading & Mktg., LLC*, 507 F.3d 1222, 1225-26 (9th Cir. 2007) (holding filed rate doctrine precludes challenge by retail customer alleging manipulation of wholesale price of electricity, noting doctrine "turns away" federal and state antitrust actions, RICO actions and state tort actions); *AT & T Corp. v. JMC Telecom, LLC*, 470 F.3d 525,535 (3rd Cir. 2006) (state law claims for fraud and negligent misrepresentation barred by filed rate doctrine where court would be forced to determine what reasonable rate would be to assess damages);

Tex. Comm'l Energy v. TXU Energy, Inc., 413 F.3d 503, 507 (5th Cir. 2005) (filed rate doctrine bars judicial recourse against regulated entity based on allegations that entity's filed rate is too high, unfair or unlawful); *In re Mirant Corp.*, 378 F.3d 511, 518 (5th Cir. 2004) (under filed rate doctrine, reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts); *Bryan v. BellSouth Comms., Inc.*, 377 F.3d 424, 432 (4th Cir. 2004) (state law claim of deceptive practice by utility effectively challenged reasonableness of filed rate and was thus barred by filed rate doctrine); *Arsberry v. Illinois*, 244 F.3d 558, 562 (7th Cir. 2001) (filed rate doctrine bars plaintiff in federal district court from seeking to invalidate or modify filed rate or seeking damages based on difference between actual and hypothetical lawful tariff); *Town of Norwood v. F.E.R.C.*, 202 F.3d 408,416 (1st Cir. 2000) (filedrate doctrine limits attacks outside regulatory process on rates filed with federal regulatory agencies);; *Tex. E. Transmission Corp. v. F.E.R.C.*, 102 F.3d 174,189 (5th Cir. 1996) (natural gas pipeline precluded from retroactively assessing customer rates based on new and different rate methodology because prior rates had been filed with federal agency); *Wegoland, Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18 (2nd Cir. 1994) (filed rate doctrine holds any rate approved by governing regulatory agency is per se reasonable and unassailable in judicial proceedings brought by ratepayers); *H.J. Inc. v. Nw. Bell Tel. Co.*, 954 F.2d 485, 488 (8th Cir. 1992) (filed rate doctrine prohibits party from recovering damages measured by comparing filed rate and rate that might have been approved absent alleged misconduct at issue).

The Fifth Circuit has enunciated the doctrine in broad terms, describing it as "bar[ring]judicial re-

course against a regulated entity based upon allegations that the entity's 'filed rate' is too high, unfair or unlawful." *Tex. Comm'l Energy,* 413 F.3d at 507. Notably, "[a]pplication of the filed rate doctrine in any particular case is not determined by the culpability of the defendant's conduct or the possibility of inequitable results." *Marcus v. AT & T Corp.,* 138 F.3d 46, 59 (2d Cir. 1998). *See, e.g., Square D Co.,* 476 U.S. at 424, 106 S. Ct. at 1931 (filed rate doctrine bars damage action against motor carriers under antitrust laws even where plaintiff alleges carriers colluded to set artificially high filed rate).

Two principles underlie the filed rate doctrine. First, the doctrine prevents regulated companies from engaging in price discrimination between customers ("nondiscrimination"). *Verizon Del., Inc. v. Covad Comms. Co.,* 377 F.3d 1081, 1086 (9th Cir. 2004); *Hill v. BellSouth Telecomms., Inc.,* 364 F.3d 1308, 1316 (11th Cir. 2004); *Fax Telecomms., Inc. v. AT & T,* 138 F.3d 479, 489 (2nd Cir. 1998). Second, the doctrine preserves the exclusive role of regulatory agencies in approving rates and keeping courts, which are far less competent to perform this function, out of the rate-making process ("nonjusticiability"). *Verizon,* 377 F.3d at 1086; *Hill,* 364 F.3d at 1316; *Fax Telecomms.,* 138 F.3d at 489. "The nonjusticiability strand recognizes that (1) legislatively appointed regulatory bodies have institutional competence to address rate-making issues; (2) courts lack the competence to set rates; and (3) the interference of courts in the rate-making process would subvert the authority of rate-setting bodies and undermine the regulatory regime." *Verizon,* 377 F.3d at 1086 (quoting *Fax Telecomms.,* 138 F.3d at 489).

Defendants contend all of Plaintiffs' claims are barred under the filed rate doctrine as each of the claims are predicated on the theory that the title insurance rates charged by them were improperly elevated. They maintain because those rates are regulated and set by the Texas Department of Insurance, determination of Plaintiffs' claims would require this Court to review the reasonableness of those rates. Accordingly, Defendants assert the claims are barred under the filed rate doctrine.

Plaintiffs argue the filed rate doctrine does not apply to bar this action because Defendants have cited "no controlling legal authority to suggest that the Texas Supreme Court" would craft an exemption from the antitrust laws based on the doctrine. (Plf. Oppos. at 15). They contend other federal district courts and the Texas Supreme Court have declined to apply the doctrine to substantially similar claims.

Unfortunately, Plaintiffs do not cite any "controlling legal authority" in support of their position. Rather, they rely heavily on two district court cases, one from Washington and one from Maryland. Additionally, Plaintiffs attempt to distinguish the cases decided by the Fifth Circuit and Texas district courts which are clearly contrary to their position. As set forth more fully below, the Court finds Plaintiffs' arguments unpersuasive.

Notably, Plaintiffs do not argue title insurers and the rates they charge are not subject to a comprehensive regulatory scheme in Texas. *See* Am. Compl.1J 17 ("[i]n Texas, the Department of Insurance sets rates for title insurance that must be charged by all sellers of title insurance"); TEX. INS.

CODE. ANN.§ 2501.002 (a) (Vernon 2009) (purpose of portion of insurance code provisions relating to title insurance "is to completely regulate the business of title insurance on real property" while "protect[ing] consumers and purchasers of title insurance policies" and "provid[ing] adequate and reasonable rates of return for title insurance companies"); *Id.* § 2703.151 (a) (insurance commissioner "shall fix and promulgate" premium rates to be charged by title insurance company). *See also Texas Oep't of Ins. v. Reconveyance Servs., Inc.*, 240 S. W.3d 418, 425 (Tex. App.-Austin 2007, pet. filed) (discussing regulation of title insurance in Texas). Indeed, as Plaintiffs themselves acknowledge by attaching to their complaint the notice of hearing issued by the Texas Department of Insurance for disciplinary action against one of the defendants, allegations substantially similar to those at issue in this action have been the subject of action by the insurance commission. (Am. Compo Ex. 1). Numerous federal district courts have applied the filed rate doctrine to actions against insurers subject to such comprehensive regulation. *See, e.g., Rios v. State Farm Fire & Cas. Co.*, 469 F. Supp. 2d 727,737 (S.D. Iowa 2007) (applying filed rate doctrine to common law claim seeking return of insurance premiums); *Mullinax v. Radian Guar. Inc.*, 311 F. Supp. 2d 474, 484 n.6 (M.D.N.C. 2004) (filing of rate by defendant with state Department of Insurance bars plaintiffs from challenging reasonableness of those rates); *Kirksey v. Am. Bankers Ins. Co.*, 114 F. Supp. 2d 526, 529 (S.D. Miss. 2000) (applying filed rate doctrine to insurance companies); *Stevens v. Union Planters Corp.*, 2000 WL 33128256, at *3 (E.D. Pa. Aug. 22, 2000) (allegation of kickbacks in forced hazard insurance scheme barred by filed rate doctrine); *Allen v. State Farm Fire & Cas. Co.*, 59 F. Supp. 2d

1217, 1229 (S.D. Ala. 1999) (filed rate doctrine barred claim challenging unlawfulness of rate filing by insurance company); *Korte v. Allstate Ins. Co.,* 48 F. Supp. 2d 647,651 (E.D. Tex. 1999) (applying filed rate doctrine to claim asserting insurance rates improper due to submission by defendant of illegal subsidy factor accounts to state insurance regulator because state agency determined reasonable rates pursuant to statutory scheme); *Morales v. Attorneys' Title Ins. Fund, Inc.,* 983 F. Supp. 1418, 1429 (S.D. Fla. 1997) (dismissing plaintiffs' kickback claim against title insurer pursuant to filed rate doctrine because claim was nothing more than challenge to title insurance rates set by state regulators); *Calico Trailer Mfg. Co.,Inc. v. Ins. Co. of N. Am.,* 1994 WL 823554 at *6 (E.D. Ark. Oct. 12, 1994) (filed rate doctrine barred plaintiffs challenge to insurance rates as inflated as result of conspiracy among defendant insurance companies).

Further, contrary to Plaintiffs' suggestion, "controlling legal authority" has recognized the applicability of the filed rate doctrine to antitrust claims. *See Square D,* 476 U.S. at 424,106 S. Ct. at 1931 (filed rate doctrine bars damage action against motor carriers under antitrust laws); *Keogh,* 260 U.S. at 163,43 S. Ct. at 49-50 (holding plaintiff could not bring antitrust complaint challenging filed tariff); *Texas Comm'l Energy,* 413 F.3d at 509 (filed rate doctrine applies to bar federal and state antitrust claims). Although the Texas Supreme Court has not specifically held the filed rate doctrine bars antitrust claims, that court has clearly recognized the validity of the filed rate doctrine generally. *See Mid-Century Ins. Co. v. Ademaj,* 243 S.W.3d 618,625 (Tex. 2007) (noting filed rate doctrine applies in Texas); *South-*

western Elec. Power Co. v. Grant, 73 S.W.3d 211,216-17 (Tex. 2002) (filed rate doctrine prohibits customer from suing utility in contract or tort over issues that filed tariff governs).

Plaintiffs argue the two Texas Supreme Court cases recognizing the validity of the filed rate doctrine do not afford Defendants any protection against this action. They point out the court in *Mid-Century* declined to apply the filed rate doctrine to a case attacking the validity of a fee charged by insurers in addition to the insurance premium as beyond the filed rate. In so doing, however, the Texas Supreme Court specifically noted the filed rate doctrine applied in Texas, but concluded it did not bar plaintiff's claims because the fee charged was specifically authorized by a rule of the "appropriate regulatory authority." *Mid-Century,* 243 S.W.3d at 625. In essence, the court declined to approve the plaintiffs' attempt to use the filed rate doctrine as an offensive weapon to prohibit defendants from charging a fee authorized by a state regulator. The Court does not find the decision in *Mid-Century* acts to prevent the defensive use of the filed rate doctrine in this action as a bar to Plaintiffs' attack on the validity of the filed rates charged by Defendants as authorized by the Texas Department of Insurance.

Plaintiffs also argue the Texas Supreme Court's decision in *Southwestern Elec. Power Co.* is inapposite. At issue In that case was whether a provision in the filed tariff of the defendant electric utility limiting liability was legally permissible. The Texas Supreme Court concluded the state regulator had the authority to include such a provision in the filed tariff, such a limitation was reasonable as a matter of

law, and the filed rate doctrine thus applied to bar plaintiff's claims. *Southwestern Elec. Power Co.*, 73 S. W.3d at 222. The undersigned agrees with Plaintiffs that the decision is not directly informative as to the matters at issue in this case, but the case nonetheless makes clear that the Texas Supreme Court recognizes and applies the filed rate doctrine. Thus the decision does not stand as "legally controlling authority" preventing application of the doctrine to this action.

Plaintiffs further urge this Court to rely on federal district court cases from Washington and Maryland to reject the application of the filed rate doctrine to this action. In the Washington case consumers sought certification of a class action under the Real Estate Settlement Procedures Act ("RESPA") and state consumer protection statutes for a class of persons who purchased title insurance from the defendants. The plaintiffs alleged, based on a report issued by the Washington State Office of the Insurance Commissioner ("OIC"), that the defendants paid inducements to developers, lenders, loan brokers, real estate agents, and other real estate settlement service providers to obtain their referrals in contravention of Washington law. The title insurer defendants argued the filed rate doctrine precluded the claims against them because the case essentially challenged rates established by a regulatory agency. The court denied the motion, "declin[ing] to extend Washington law to apply the filed rate doctrine to bar Plaintiffs' claims." *Blaylock v. First Am. Title Ins. Co.*, 504 F. Supp. 2d 1091,1103 (W.D. Wash. 2007).

In considering the persuasiveness of the *Blaylock* decision the Court finds significant the rationale

enunciated by the Washington court. That court stated the decision "[c]onsider[ed] the gradual erosion of the rationale for the doctrine, the cautionary note of the Washington Supreme Court in the only case discussing the doctrine, and the uneasy fit between the animating purposes of the doctrine and the facts of this case" *Id.* Specifically, the *Blaylock* court noted the only guidance it found in Washington case law was "a statement of the primary purposes of the doctrine and a cautionary note that it should not be applied rigidly in situations that do not advance its central purposes." *Id.* at 1101. In contrast, this Court has recent pronouncements of both the Fifth Circuit and the Texas Supreme Court recognizing the continued validity of the filed rate doctrine. Indeed, the Fifth Circuit referred to the doctrine as "consistently applied" to render filed rates "unassailable in judicial proceedings brought by ratepayers." *Texas Comm'l Energy,* 413 F.3d at 508.

Significantly, the *Blaylock* court also reviewed the regulatory oversight provided by the Washington OIC. The court stated:

> while the regulatory scheme under the Insurance Code is generally quite comprehensive with respect to insurance rates, title insurance is exempted from this comprehensive scheme. By contrast, title insurance rates are subjected only to superficial regulation - while the rates must be submitted to the OIC, the Code does not mandate that they receive any review by the Commissioner.

Blaylock, 504 F. Supp. 2d at 1102-03. Plaintiffs have not suggested title insurance in Texas is subject

to a similarly lax review process. Rather, as set forth above, the regulatory oversight scheme for title insurance companies in Texas is clearly distinguishable from the scheme in effect in Washington. Thus, based on the significant differences in the two regulatory climates, and the differences in governing case law, the Court declines to find the decision in *Blaylock* persuasive.

The second case cited by Plaintiffs also involved claims brought under RESPA. The plaintiff alleged she purchased a house through one of the defendants, a real estate company, and paid a portion of the title insurance charges to a separate defendant, which she alleged was a sham affiliated business entity jointly owned by the other defendants. The plaintiff claimed the title insurance fees were partially channeled to the real estate company as a kickback or referral fee. Defendants moved to dismiss the action, arguing the plaintiff had not stated a viable claim because she was not alleging she was charged more than the rates filed by the title insurer and thus her challenge could only be to the reasonableness of the rate she was charged. The court disagreed, concluding the plaintiff was not challenging the reasonableness of the fee in and of itself, but was instead arguing she could have been charged a lesser fee by one of the affiliated defendants, which was also on file with the state regulator. *Robinson v. Fountainhead Title Group Corp.*, 447 F. Supp. 2d 478,488 (D. Md. 2006). Accordingly, the court found the claims were not subject to the filed rate doctrine bar. *Id.*

As discussed above, Plaintiffs are not alleging they were charged more than the applicable filed

rate. Rather, they are claiming that the filed rates are the product of improper conduct. Accordingly, the analysis in *Robinson* is not applicable to this action.

Not surprisingly, Plaintiffs have not cited cases decided by Texas district courts addressing the assertion of the filed rate doctrine. In light of the clear precedential value of the Fifth Circuit's decision in *Texas Commercial Energy,* the Court finds particularly instructive the detailed discussion of that case in *Utility Choice, L.P. v. TXU Corp.,* 2005 WL 3307524 (S.D. Tex. Dec. 6, 2005). In *Utility Choice* two retail electric providers brought suit against other retail electric providers as well as power generation companies. Plaintiffs brought both federal antitrust and RICO claims, as well as state claims, alleging the defendants unlawfully cornered and conspired to monopolize and manipulate prices in the Texas energy market. Defendants maintained those claims were barred by the filed rate doctrine.[2]

The court in *Utility Choice* found the decision in *Texas Commercial Energy* forestalled the plaintiffs' claims, noting the Fifth Circuit had found the electric energy market subject to regulation by the Public Utility Commission of Texas and thus challenges to the price of energy were effectively challenges to a filed rate. *Utility Choice, LP,* 2005 WL 3307524 at *3. The court further rejected the plaintiffs' argument that the lack of a substitute mechanism for recovery made the filedrate doctrine inapplicable, rea-

---

[2] The defendants in *Utility Choice* did not seek application of the doctrine to a claim based on allegations of improper conduct with the Texas General Land Office.

soning any other conclusion would be in clear conflict with the decision in *Texas Commercial Energy*. *Id.* at *3-4 This finding is particularly instructive as Plaintiffs here also argue a private right of action is afforded to them by the Texas Insurance Code. *See* TEX. INS. CODE. ANN. § 541.003 (prohibiting engaging in unfair methods of competition in the business of insurance); §§ 541.054,541.055,541.061 (defining unfair methods of competition). As in *Utility Choice,* the Court does not find the prohibition against improper conduct incorporated in Texas statutes to be an avenue for relief for the plaintiffs. Providing for a private right of action for unfair competition, which could encompass a wide array of activity, does not insolubly conflict with the filed rate doctrine limitation on actions directly challenging the validity of a rate set by a state agency.

Nor is the Court persuaded by Plaintiffs' final attempt to evade the reach of the filed rate doctrine. Plaintiffs maintain their claims are not barred because they are not seeking to undo a rate, but are seeking "merely to recover damages based on defendants' illegal conduct." (Plf. Oppos. at 18). Such a characterization of their claims is nothing short of disingenuous. As Defendants point out, earlier in the same pleading Plaintiffs admit they are seeking "to recover for substantially illegal overcharges." *(Id.* at 10). Further, in their complaint they ask for relief "to compensate them for the overcharges they incurred." (Am. Compl. at 28). Plaintiffs also make clear in their complaint that they believe: (1) the anticompetitive actions of Defendants have resulted in an increase in the amount paid for title insurance *(Id. ¶* 85); and (2) Defendants' acquired money from them for the purchase of title insurance in violation of the

DTPA. *(Id. ¶¶*85). These allegations clearly rest on the amount paid by Plaintiffs for title insurance, effectively implicating the validity of the rates set for title insurance in Texas. Plaintiffs thus cannot now contend they should not be subject to the filed rate doctrine on the basis that they are not challenging the validity of rates approved by the Texas Department of Insurance. *See Hill,* 364 F.3d at 1317 (even if claim does not directly attack filed rate, award of damages that would effectively result in judicial determination of reasonableness of rate is prohibited under filed rate doctrine). The Court, therefore, concludes Defendants' motion to dismiss this case based on the filed rate doctrine is proper.

As the undersigned has concluded Defendants are entitled to dismissal of all of Plaintiffs' claims under the filed rate doctrine, the other arguments raised by Defendants for dismissal need not be addressed.

In accordance with the foregoing:

IT IS ORDERED that Defendants' Joint Motion to Dismiss the Amended Complaint With Prejudice and Supporting Memorandum of Legal Authorities [#24] is GRANTED.

SIGNED this the 13th day of May 2009.

/s/
SAM SPARKS
UNITED STATES DISTRICT JUDGE